No. 07-619

In the Supreme Court of the United States

PT PERTAMINA (PERSERO), FKA PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA, PETITIONER

v.

KARAHA BODAS COMPANY, L.L.C.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the satisfaction of a money judgment divests a federal district court of subject matter jurisdiction to maintain an antisuit injunction designed to prevent the losing party from seeking to reverse the results of that judgment.

2. Whether the district court properly exercised "secondary jurisdiction" under the convention governing enforcement of international arbitration awards when it issued a foreign antisuit injunction in the circumstances of this case.

3. Whether the courts below gave proper weight to considerations of international comity in issuing a foreign antisuit injunction in the circumstances of this case.

TABLE OF CONTENTS

Page

Statement 1
Discussion 9
A. The decision below is correct 10
B. Further review is not warranted 15
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Dietzsch v. *Huidekoper*, 103 U.S. 494 (1880) 10, 11
Dugas v. *American Surety Co.*, 300 U.S. 414 (1937) 12
E. & J. Gallo Winery v. *Andina Licores S.A.*, 446 F.3d 600 (7th Cir. 2006) 18
eBay Inc. v. *MercExchange L.L.C.*, 547 U.S. 388 (2006) 20
French v. *Hay*, 89 U.S. 250 (1874) 11
Gau Shan Co. v. *Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992) 20, 21
General Elec. Co. v. *Deutz*, 270 F.3d 144 (3d Cir. 2001) 19, 21
Goss Int'l Corp. v. *Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (2d Cir. 2007) 9
Kern v. *Huidekoper*, 103 U.S. 485 (1880) 10
Kokkonen v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994) 12
Local Loan Co. v. *Hunt*, 292 U.S. 234 (1934) 12
Pacific R.R. v. *Missouri Pac. Ry.*, 111 U.S. 505 (1884) .. 13

Cases—Continued: Page

Paramedics Electromedicina Comercial, Ltda. v. *GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645 (2d Cir. 2004) 14

Peacock v. *Thomas*, 516 U.S. 349 (1996) 12, 13

Philips Med. Sys. Int'l B.V. v. *Bruetman*, 8 F.3d 600 (7th Cir. 1993) 19

Riggs v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867) ... 12

United States v. *Beggerly*, 524 U.S. 38 (1998) 13

Treaty, statute and rule:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 1

Art. I(1), 21 U.S.T. 2519, 330 U.N.T.S. 38 2

Art. V, 21 U.S.T. 2520, 330 U.N.T.S. 40 2

Art. V(1)(e), 21 U.S.T. 2520, 330 U.N.T.S. 42 2

28 U.S.C. 1963 14

Fed. R. Civ. P. 60(b) 15

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention), *adopted* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3,[1] which governs "recognition and enforcement of arbitral awards * * * not considered as domestic awards in the State

[1] Subsequent citations will be to the text of the New York Convention as reproduced in the appendix to the petition for a writ of certiorari. Pet. App. 287a-297a.

where their recognition and enforcement are sought." Art. I(1) (Pet. App. 287a-288a). Article V of the Convention describes the situations in which a court may refuse to enforce a foreign arbitral award. It expressly contemplates that an award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" under standards set forth in such nation's domestic law. Art. V(1)(e) (Pet. App. 291a); see *id.* at 175a-176a. If such an authority—which the Second Circuit denominated a "primary" jurisdiction—sets aside or suspends an award, courts in so-called "secondary" jurisdictions "may" refuse to enforce it. *Id* at 103a; see Art. V(1)(e) (Pet. App. 290a-291a). But if an arbitration award has "become binding on the parties" and not been annulled by a tribunal having "primary" jurisdiction, courts in "secondary" jurisdictions may refuse to enforce it only if one of six other exceptions set forth in the New York Convention is applicable. Art. V(1)(e) (Pet. App. 290a-291a).

2. Petitioner, an oil and gas company owned by the Republic of Indonesia, and respondent, a Cayman Island corporation, entered into a joint venture to develop natural energy resources in Indonesia. Pet. App. 4a. The parties agreed that any disputes would be settled through arbitration in Switzerland. *Ibid.* Respondent commenced arbitration after the Indonesian government suspended the project on which the parties had agreed to collaborate. *Ibid.* In 2000, a Swiss arbitration panel awarded respondent $261.1 million in damages, lost profits, and costs (2000 arbitration award). *Id.* at 5a, 48a. Petitioner challenged the 2000 arbitration award in the Swiss courts, but its petition was dismissed because petitioner failed to pay the required fees. *Id.* at 5a. The

Swiss courts denied petitioner's request for reconsideration. *Ibid.*

3. a. Respondent sought enforcement of the 2000 arbitration award in the United States District Court for the Southern District of Texas, which entered an order confirming the award. Pet. App. 243a-286a. Petitioner appealed, but failed to post a supersedeas bond, and the district court entered orders permitting respondent to begin executing on the judgment in the United States. *Id.* at 160a. Respondent also commenced enforcement proceedings in Canada, Hong Kong, and Singapore, eventually obtaining $898,682.90 in Hong Kong. *Id.* at 51a.

b. While its Fifth Circuit appeal was pending, petitioner filed a new action in Indonesia, seeking annulment of the 2000 arbitration award and an injunction against its enforcement. Pet. App. 161a. The Texas district court issued a preliminary injunction that barred petitioner from taking any steps to prosecute the Indonesian action. *Id.* at 163a. The Indonesian trial court rejected petitioner's request to stay the Indonesian litigation. *Ibid.* In a later order, it concluded that it had "primary" jurisdiction under the New York Convention, annulled the 2000 arbitration award, permanently enjoined respondent from seeking to enforce it, and imposed a fine of $500,000 for each day respondent violated the injunction. *Id.* at 164a.

c. The Fifth Circuit vacated the preliminary injunction entered by the Texas district court. Pet. App. 155a-192a. The court reasoned that because the New York Convention "provides for multiple simultaneous proceedings, it is difficult to envision how court proceedings in Indonesia could amount to an inequitable hardship" on respondent. *Id.* at 176a. It also stated that it was

"uncertain" whether respondent would suffer serious "financial hardship" absent an injunction, because petitioner "ha[d] promised the district court that it w[ould] not pursue enforcement of the Indonesia injunction," there was "no record evidence that [respondent] ha[d] substantial assets in Indonesia," and it was "extremely unlikely" that any foreign court would enforce the Indonesian court's sanctions order. *Id.* at 177a.

The Fifth Circuit further concluded that the Indonesian action would not "frustrate and delay the speedy and efficient determination" of the United States proceedings or "threaten the integrity of the district court's jurisdiction or its Judgment enforcing the [2000 arbitration a]ward." Pet. App. 179a-180a. The court of appeals noted that United States "courts have discretion under the [New York] Convention to enforce an award despite annulment in another country, and have exercised that discretion in the past." *Id.* at 179a. It also determined that the Indonesian proceedings "would not precisely duplicate" those that took place in the United States, in part because "to any extent that the Indonesian courts might be acting as legitimate courts of primary jurisdiction, such courts would have domestic law grounds on which to analyze the propriety of" the award. *Id.* at 180a. Balancing "the scant vexatiousness and oppressiveness of [petitioner's] acts" against "the not insubstantial interests in preserving international comity," *id.* at 181a, the court of appeals determined that "the better course for [United States] courts to follow is to avoid the appearance of reaching out to interfere with the judicial proceedings in another country and to avoid stepping too far outside [their] limited role under the Convention," *id.* at 188a-189a.

d. In March 2004, the Indonesian Supreme Court vacated the orders of the Indonesian trial court, concluding that only the Swiss courts had authority to annul the 2000 arbitration award. Pet. App. 8a. Later that month, the Fifth Circuit affirmed the Texas district court's order confirming the award, as well as two subsequent orders denying petitioner's motions for relief from that judgment pursuant to Federal Rule of Civil Procedure 60(b). *Id.* at 88a-154a. This Court denied certiorari. 543 U.S. 917 (2004).

4. a. The current proceedings began in 2002, when respondent registered the Texas judgment in the United States District Court for the Southern District of New York. Pet. App. 9a-10a. On March 9, 2006, the Second Circuit affirmed an order directing the transfer of funds from certain New York bank accounts sufficient to satisfy the remainder of the 2000 arbitration award. *Id.* at 11a.

b. On September 15, 2006, petitioner filed an action against respondent in the Cayman Islands, claiming that the 2000 arbitration award had been procured by fraud. Pet. App. 12a. Petitioner sought restitution of "all sums received by [respondent] pursuant to the Arbitral Award (and its enforcement)," as well as an injunction prohibiting respondent from disposing of "any sums received or to be received by [respondent] pursuant to any order of" the New York district court. *Id.* at 12a-13a.

c. On October 2, 2006, this Court denied a writ of certiorari to consider the Second Circuit's March 9, 2006, decision. 127 S. Ct. 129. On November 29, 2006, the last of the funds were turned over to respondent. Pet. App. 12a n.5.

d. On December 8, 2006, the district court enjoined petitioner "from pursuing the Cayman Islands action or

any similar action in any court." Pet. App. 86a. It also entered a declaratory judgment stating that respondent "has full right to dispose of" the funds it received pursuant to the district court's judgment and had "no obligation to comply with" any order purporting to restrain its right to do so. *Id.* at 87a. The district court determined that "the entire point of the fraud allegations [in the Cayman Islands] is to show that the Arbitral Award must be deemed to be vitiated," *id.* at 65a, and to "nullify[]" and "prevent the completion and consummation of the carrying out of" the previous federal judgments confirming and enforcing the 2000 arbitration award, *id.* at 67a-68a.

e. The district court stayed its decision pending appeal. Pet. App. 15a. On February 13, 2007, the court of appeals granted respondent's motion to lift the stay, *ibid.*, and Justices Ginsburg and Kennedy denied petitioner's application to reinstate it, No. 06A790 (Feb. 14, 2007). Respondent then distributed substantially all of the remaining funds to its shareholders. Pet. App. 15a.

5. The court of appeals affirmed the district court's grant of permanent injunctive relief. Pet. App. 1a-41a. As "threshold requirements," the Second Circuit determined that "'the parties are the same in both matters'" and that "'resolution of the case before the enjoining court is dispositive of the action to be enjoined.'" *Id.* at 16a (citation omitted). It noted that two federal district courts had confirmed and enforced the 2000 arbitration award despite petitioner's argument "in the Swiss arbitration that the resource and development estimates prepared by [respondent] were fraudulent," and that "the Fifth Circuit, in affirming the [Texas district court's order], rejected [petitioner's] argument that enforcement of the Award should be refused because it

was procured by fraud." *Id.* at 22a-23a. The court of appeals concluded that petitioner's "new factual allegations" were "not sufficient to undermine the preclusive effect of several earlier federal court decisions that (1) the Award should be enforced and (2) [respondent] is entitled to [petitioner's] New York funds in an amount sufficient to satisfy the Award." *Id.* at 24a.

The court of appeals also rejected petitioner's contention that the previous federal judgments could not be dispositive of the Cayman Islands action because those courts had been acting as "secondary" jurisdictions under the New York Convention. Pet. App. 26a. It "agree[d] with the Fifth Circuit that federal courts should not attempt to protect a party seeking enforcement * * * 'from *all* of the legal hardships' associated with foreign litigation" and "cannot dictate to other 'secondary' jurisdictions * * * whether the award should be confirmed or enforced in those jurisdictions." *Id.* at 27a (quoting *id.* at 178a). But the court of appeals determined that the subsequent entry of a final judgment ordering petitioner to turn over certain identifiable funds, as well as the nature of the Cayman Islands action, distinguished the district court's injunction from the preliminary injunction vacated by the Fifth Circuit. *Id.* at 28a-29a. The court explained that whereas petitioner "had an arguable—though ultimately meritless—basis for claiming that the Indonesian proceedings were permissible under the New York Convention," petitioner had not even "attempt[ed] to argue that the Cayman Islands action is one that would be contemplated by the Convention." *Id.* at 29a-30a.

The court of appeals held that various additional factors likewise supported an antisuit injunction. Pet. App. 31a-35a. It began with two factors having "greater sig-

nificance"—"whether the foreign action threatens the jurisdiction or the strong public policies of the enjoining forum"—and found them both present. *Id.* at 32a. The court also concluded that another factor—"whether the foreign action would be vexatious—counsel[ed] strongly in favor of the injunction," because "the entire point of" the Cayman Islands action was to challenge an arbitral award that had been confirmed and enforced by United States courts in proceedings in which petitioner could have, but had not, raised its current objections. *Id.* at 33a (quoting *id.* at 65a).

The court of appeals stressed that comity concerns "have particular importance under the Convention," and that "a federal court should be wary of entering injunctions that may prevent parties from engaging" in "proceedings that are contemplated by the Convention." Pet. App. 35a. But it stated that comity considerations "have 'diminished force' when a court has already reached a judgment involving the same issues and parties," and that "comity concerns under the Convention have no bearing on our consideration of the Cayman Islands action, which is not a proceeding contemplated by the Convention and is * * * intended to undermine federal judgments." *Id.* at 34a-35a (citation omitted).

Finally, the court of appeals rejected petitioner's assertion that the satisfaction of the money judgment had divested the district court of jurisdiction to maintain the antisuit injunction. Pet. App. 35a. The Second Circuit acknowledged that the Eighth Circuit had cited both "jurisdictional circumstances and comity considerations" in reversing a district court's grant of a foreign antisuit injunction in a situation where "there [wa]s no longer an outstanding judgment to protect." *Id.* at 37a (brackets in original) (quoting *Goss Int'l Corp.* v. *Man*

Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 368 (2007), petition for cert. pending, No. 07-618 (filed Oct. 15, 2007) (*Goss*)).[2] The Second Circuit concluded, however, that "federal courts have continuing jurisdiction * * * to enjoin a party properly before them from relitigating issues in a non-federal forum that were already decided in federal court," and that "[t]his source of jurisdiction remains even after a judgment has been satisfied." *Id.* at 38a. The court of appeals agreed with *Goss* that "a federal court may in some circumstances * * * have a diminished need for an anti-suit injunction to protect a judgment once ancillary proceedings to satisfy the judgment have run their course." *Id.* at 40a n.19. But it determined that such circumstances were "not presented here," because, "[w]ere we to vacate the District Court's injunction, [petitioner] would be free to engage in vexatious proceedings * * * intended to undermine or vitiate federal judgments." *Id.* at 40a & n.19.

DISCUSSION

The court of appeals' decision is correct and does not warrant further review. The transfer of funds to respondent pursuant to an order of the district court did not divest the court of subject matter jurisdiction to ensure that that very transfer would not subsequently be undone. In addition, it was appropriate for the district court to enjoin petitioner from pursuing litigation that was by its terms designed to undo the results of final federal judgments.

Although the Second Circuit's jurisdictional holding may conflict with the Eighth Circuit's decision in *Goss*,

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[2] Subsequent citations will be to the appendix to the petition for a writ of certiorari in *Goss* (*Goss* Pet. App.).

the scope of any conflict is narrow and uncertain, and involves an issue that does not appear to arise frequently. The only proffered ground for review of the second question presented is a purported conflict between decisions issued in this litigation, but the court below plausibly distinguished the Fifth Circuit's earlier decision. Finally, although the courts of appeals have employed different formulations regarding the standards for issuing foreign antisuit injunctions, it is not clear that those differences in language have actually translated into different results, and an injunction would be warranted here even under the strictest formulation.

A. The Decision Below Is Correct

1. The transfer of funds sufficient to satisfy the district court's judgment did not divest that court of subject matter jurisdiction to maintain an antisuit injunction. Rather, this Court's decisions make clear that the district court possessed authority to restrain petitioner from prosecuting another action that sought to nullify or evade its previous judgment.

In *Dietzsch* v. *Huidekoper*, 103 U.S. 494 (1880), a replevin action originally filed in state court was properly removed to federal court after the plaintiffs had obtained possession of the property by posting a replevin bond. *Id.* at 496; see *Kern* v. *Huidekoper*, 103 U.S. 485, 486-490 (1880). Despite the valid removal, both courts proceeded to adjudicate the action, with the state court entering judgment for the defendant and the federal court entering judgment for the plaintiffs, thereby confirming their right to continued possession of the replevied property. *Id.* at 489. The defendant then brought a further action in state court to collect the replevin bond, see *id.* at 486—that is, "to enforce the

judgment of [the state] court in the replevin suit" by obtaining relief that was "equivalent to an actual return of the replevied property." *Dietzsch*, 103 U.S. at 497. This Court held that the federal court had authority to enjoin the defendant from prosecuting the second state court suit. The Court described the request for the injunction as "ancillary" and "auxiliary to" the earlier federal action, and stated that a federal court "has the right to enforce [its] judgment against the party defendant and those whom he represents, no matter how or when they attempt to evade it or escape its effect." *Id.* at 497-498.

Dietzsch is controlling here. The purpose of the district court's injunction was "to enforce its own judgment by preventing the defeated party from wresting" away from respondent "the substantial fruits of a judgment rendered in [its] favor." *Dietzsch*, 103 U.S. at 497-498. To conclude that the district court lacked jurisdiction to maintain an injunction following transfer of the funds would mean that the final judgment "settle[d] nothing" and leave respondent "under the necessity of engaging in a new conflict elsewhere." *Id.* at 498. Such a "result would have shown the existence of a great defect in our Federal jurisprudence, and have been a reproach upon the administration of justice." *French* v. *Hay*, 89 U.S. 250, 253 (1874).

Petitioner seeks to distinguish *Dietzsch* on the ground that the earlier federal judgment in that case was an "ongoing order[] in need of continued protection." Pet. 19. But the order was "ongoing" only in the sense that it awarded property to one party at the expense of another, which is equally true here.

Nor have later decisions undermined *Dietzsch*'s holding.[3] In 1934, the Court described it as "well settled" that "a federal court of equity has jurisdiction of a bill ancillary to an original case * * * to secure *or preserve* the fruits and advantages of a judgment or decree rendered therein," regardless of whether the original judgment was "at law or in equity" and "irrespective of whether the court would have jurisdiction if the proceeding were an original one." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) (emphasis added); accord *Dugas* v. *American Surety Co.*, 300 U.S. 414, 415-422, 428 (1937) (recognizing jurisdiction to enjoin a litigant from prosecuting a state court action that was, in substance, an attempt to impose liability on a surety that had previously been granted a full release in a federal interpleader action). More recently, the Court has stated that a court's power to "vindicate its authority" and "effectuate its decrees" extends to restricting actions that "flout[] or imperil[]" the court's judgment, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 380 (1994), and that the doctrine of ancillary jurisdiction preserves "a federal court's inherent power to enforce its judgments." *Peacock* v. *Thomas*, 516 U.S. 349, 356 (1996).

Petitioner cites (Pet. 20) *Peacock*'s statement that this Court's approval of ancillary enforcement jurisdiction "has not * * * extended beyond attempts to execute, or to guarantee eventual executability of, a federal

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[3] In *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867), which was decided before *Dietzsch*, the Court rejected the view that "the jurisdiction of a [federal] court is * * * exhausted by the rendition of the judgment," and held that jurisdiction "continues until that judgment shall be satisfied." *Id.* at 187. Because the issue was not before it, *Riggs* had no occasion to consider whether a federal court's jurisdiction invariably *terminates* upon formal satisfaction of a judgment.

judgment." 516 U.S. at 357. The Court has never held, however, that formal execution extinguishes a district court's authority to take *any* further steps to protect the efficacy of its judgments. To the contrary, the Court has reaffirmed that a court's ancillary jurisdiction may extend past satisfaction of a money judgment in certain circumstances. See, *e.g.*, *United States* v. *Beggerly*, 524 U.S. 38, 45-47 (1998) (acknowledging ancillary jurisdiction to set aside judgment procured by fraud); *Pacific R.R.* v. *Missouri Pac. Ry.*, 111 U.S. 505, 506-507, 521-522 (1884) (same). Although in the normal course satisfaction of the judgment will extinguish the material threats to the judgment, nothing in this Court's cases suggests a lack of authority to protect a judgment from extraordinary challenges of the type attempted here. *Peacock* itself simply held that a district court lacked ancillary jurisdiction over "a subsequent lawsuit" against "a person not already liable for [an existing federal] judgment" where the new liability would be founded "upon different facts" and "entirely new theories of liability." *Peacock*, 516 U.S. at 357-358.

2. The court of appeals correctly held that the district court did not abuse its discretion in granting an antisuit injunction. Comity considerations should play a substantial role when a federal court is asked to enjoin a party from engaging in litigation in a foreign forum, and such injunctions should "'be "used sparingly" and granted only with care and great restraint.'" Pet. App. 17a (citations omitted). In the unusual circumstances of this case, however, a foreign antisuit injunction was appropriate.

Reduced to their essence, the federal judgments that the antisuit injunction seeks to protect establish that: (a) the 2000 arbitration award will be enforced in the

United States; and (b) as a result, respondent has a superior claim on certain funds that were formerly held in New York bank accounts. In the Cayman Islands action, petitioner sought a determination that the award upon which the United States judgments were based was "vitiat[ed]" by fraud, and a return of "all sums received by [respondent] pursuant to the Arbitral Award (and its enforcement)." Pet. App. 12a-13a. Because "[a]lmost the entire judgment debt (99 7/10%) was paid from funds restrained in the federal court in New York, in proceedings based on the judgment of the federal court in Texas," *id.* at 79a, it is clear that "the entire point" of the Cayman Islands action is to overturn the results of the United States proceedings, *id.* at 33a. "[C]onsiderations of comity have diminished force" in those circumstances, *Paramedics Electromedicina Comercial, Ltda.* v. *GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004), and a United States court typically has a significant interest in vindicating its own final judgments against collateral attacks designed to nullify or effectively reverse them.[4]

The antisuit injunction here is also supported by the strong public policies favoring the orderly processing of litigation and the finality of judgments. Petitioner had the opportunity to present any substantive defenses to the Swiss arbitration panel. Pet. App. 4a. Petitioner presented a fraud defense, but it was rejected by the

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[4] The United States disagrees with the suggestion that the New York district court "had a much more limited role" than the Texas district court. Republic of Indonesia Amicus Br. 9. A registered judgment has "the same effect as a judgment of" the court in which it is registered "and may be enforced in like manner." 28 U.S.C. 1963. Accordingly, the district court's authority to issue the injunction derives from "all of the federal judgments related to the case." Pet. App. 22a.

arbitrators. *Id.* at 4a-5a. Petitioner also had the opportunity to seek further review within the Swiss system, but failed to comply with the filing-fee requirement. *Id.* at 5a. And despite acknowledging that it had possession of the documents on which the Cayman Islands action was based no later than November 2002 (Pet. 8), petitioner did not seek to raise its current allegations in either the Fifth Circuit confirmation litigation, which ended in 2004, or the Second Circuit enforcement litigation, which ended in 2006. Pet. App. 78a-79a.

The policies underlying the New York Convention likewise support an antisuit injunction in this case, and further diminish the weight of the comity concerns cited by petitioner. The Convention strongly favors the use of arbitration as a means to settle disputes efficiently and quickly. The Supreme Court of Indonesia—the only other possible "primary" jurisdiction with respect to the 2000 arbitration award—concluded that only the Swiss courts would have authority to set aside or annul that award. Pet. App. 8a. Accordingly, permitting petitioner to pursue the Cayman Islands action "would tend to undermine the regime established by the Convention for recognition and enforcement of arbitral awards." *Id.* at 30a.

B. Further Review Is Not Warranted

For the reasons explained above, the lower courts reached the correct result in this case. Further review is not warranted.

1. The first question presented involves a narrow issue: whether the transfer of funds sufficient to satisfy an underlying money judgment divests a district court of jurisdiction to maintain an antisuit injunction. In *Goss*, the Eighth Circuit cited "jurisdictional circum-

stances and comity considerations" as the basis for concluding that, "under the facts of th[at] case, the maintenance of [an] antisuit injunction on a satisfied judgment could not be justified." *Goss* Pet. App. 28a-29a. Although the scope of *Goss*'s holding is unclear, the decision can plausibly be read as stating that a federal court lacks jurisdiction to maintain an antisuit injunction if its judgment awarded only monetary relief and has been fully satisfied. See U.S. Amicus Br. at 14, *Goss*, *supra* (No. 07-618) (*Goss* Br.). Under that reading of *Goss*, its jurisdictional holding would conflict with the Second Circuit's decision in this case.

On the other hand, there is language in *Goss* that could be viewed as limiting its jurisdictional holding to situations in which the new proceeding is "'entirely new and original'" and involves issues that "are not the same" as those in the completed federal proceeding. *Goss* Pet. App. 22a-23a (citation omitted); see *Goss* Br. 13-14. If that reading were correct, there would be no conflict, because the court below limited its jurisdictional holding to injunctions that bar a party "from relitigating issues in a non-federal forum that were *already decided in federal court*." Pet. App. 38a (emphasis added).

In any event, the potential conflict between *Goss* and the decision below does not merit further review at this time. Any conflict is of recent vintage and involves only two circuits. The parties have cited no other appellate decisions addressing the narrow question of ancillary jurisdiction at issue here, and thus it appears that the question arises infrequently. Moreover, it remains to be seen whether the Eighth Circuit will apply the jurisdictional rule enunciated in *Goss* even when, as here (but unlike in *Goss*), the court recognizes that the action to

be enjoined constitutes an attempted re-litigation of the earlier suit.

2. The second question involves the permissibility of an antisuit injunction when a district court is acting as a "secondary" jurisdiction under the New York Convention. Petitioner has not identified any federal court decisions addressing that question other than those issued in connection with this litigation. That fact alone suggests that the issue may not be of recurring importance.

Petitioner asserts (Pet. 22-30) that the Second Circuit's affirmance of the injunction entered by the Southern District of New York conflicts with the Fifth Circuit's vacatur of the preliminary injunction entered by the Southern District of Texas. Petitioner acknowledges that the Second Circuit distinguished, rather than disagreed with, the Fifth Circuit's decision, but contends that the reasons given by the Second Circuit cannot withstand scrutiny. Pet. 26-29.

That dispute over the best reading of a prior decision in this litigation self-evidently does not warrant this Court's review. The Second and Fifth Circuits both *rejected* petitioner's claim that the New York Convention categorically bars a "secondary" jurisdiction from issuing a foreign antisuit injunction. Pet. App. 28a, 168a-169a. Both courts likewise agreed that a federal court should not attempt to protect respondent "from all the legal hardships it might undergo in a foreign country." *Id.* at 178a; see *id.* at 27a. But, as the Second Circuit explained, "it does not follow" that "a federal court cannot protect a party who is the beneficiary of a federal judgment enforcing a foreign arbitral award from *any* of the legal hardships that a party seeking to evade enforcement of that judgment might seek to impose." *Ibid.* Nor did the Fifth Circuit say anything to the con-

trary. In fact, it gave a lengthy explanation of why it was "uncertain whether the financial hardship about which [respondent] complains will ever materialize," *id.* at 177a.

Contrary to petitioner's suggestion (Pet. 28), the Second Circuit *did* explain why the district court's turnover order was different from the Texas district court's confirmation order. Whereas an annulment of the 2000 arbitration award by an Indonesian court would not have precluded that award from being enforced in the United States, see Pet. App. 179a, a key purpose of the Cayman Islands action was to undo the New York district court's "definitive determination that [respondent] was entitled to the funds that [petitioner] held in the New York bank accounts." *Id.* at 28a. Petitioner also asserts (Pet. 28) that the fact that Indonesia had a "colorable argument" to being a "primary" jurisdiction "was not a factor in [the Fifth Circuit's] decision." That argument is belied by the Fifth Circuit's reference to that possibility as one reason why "the duplication inherent in the Indonesian proceeding is less problematic than it might be otherwise," Pet. App. 180a, as well as its expression of concern that the Texas district court's reasoning might be seen as authority for a court in a "secondary" jurisdiction "to enjoin proceedings in countries with arguable primary jurisdiction," *id.* at 186a.

3. The third question presented involves the proper standards for granting foreign antisuit injunctions. Although the courts of appeals have enunciated different verbal formulations of the proper test, it appears that all give weight to comity concerns, and it is not clear that the different formulations have actually produced different results in cases with comparable facts. See, *e.g.*, *E. & J. Gallo Winery* v. *Andina Licores S.A.*, 446 F.3d

984, 995 (9th Cir. 2006) (stating that although "[t]here may be different views among circuits as to the relative importance to be given to comity in deciding whether to file an anti-suit injunction," it was unnecessary to "express [an] opinion on these possible differences" because "in this case, an anti-suit injunction would be appropriate under any test"); *Philips Med. Sys. Int'l B.V.* v. *Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (declining to "make a definitive choice" regarding the proper standard "or even decide whether the differences between the standards are more than verbal, that is, whether they ever dictate different outcomes," because an injunction was warranted "even under the more demanding standard"). And even assuming that the different formulations will produce materially different outcomes, this case would not be a suitable vehicle for choosing among them, because an injunction would be appropriate here under any of those formulations and because this case arises in an unusually complex and multifaceted procedural setting.

Petitioner contends (Pet. 32-36) that what has generally been described as a two-way conflict between "liberal" and "conservative" approaches is, in reality, a three-way conflict. According to petitioner, whereas the Third, Sixth, and Eighth Circuits permit consideration of *only* two factors—*i.e.*, whether there is a threat to the forum court's own jurisdiction or a need to protect important public policies—the First, Second, and D.C. Circuits "permit consideration of other factors." Pet. 33-34.

It is not clear that there is actually a three-way conflict regarding the proper formulation. The Third, Sixth, and Eighth Circuits have expressly aligned their approaches with that of the Second Circuit. See *Goss* Pet. App. 8a, 11a; *General Elec. Co.* v. *Deutz*, 270 F.3d

144, 160-161 (3d Cir. 2001); *Gau Shan Co.* v. *Bankers Trust Co.*, 956 F.2d 1349, 1352-1354 (6th Cir. 1992). In addition, the Third Circuit has stated that, under "the more restrictive standard," "[v]exatiousness and inconvenience to the parties carry far less weight," which is consistent with the Second Circuit's statement here that courts should afford "greater significance" to "whether the foreign action threatens the enjoining forum's jurisdiction or its strong public policies." Pet. App. 17a (internal quotation marks and citation omitted).

The Sixth Circuit has stated that an antisuit injunction may not be "based upon" factors like "vexatiousness," "oppressiveness," or a "race to judgment," and that considerations of international comity "preclude[] the issuance of an antisuit injunction" *unless* a federal court's "jurisdiction is * * * threatened" or "important public policies [are] being evaded." *Gau Shan*, 956 F.2d at 1355, 1358; accord *Goss* Pet. App. 8a (stating that "a foreign antisuit injunction will issue only if the movant demonstrates (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity"). But because *Gau Shan* and *Goss* both concluded that there was no need to protect jurisdiction or important public policies in those cases, see *Gau Shan*, 956 F.2d at 1355-1358; *Goss* Pet. App. 20a-25a, they had no occasion to decide whether other considerations have a role to play where one or both of those factors is satisfied. And given the inherently flexible, equitable nature of the injunction inquiry, it is unreasonable to assume that those courts intended to adopt a categorical prohibition against consideration of other factors. Cf. *eBay Inc.* v. *MercExchange L.L.C.*, 547 U.S. 388 (2006).

Whether there are ultimately two or three competing standards, the antisuit injunction in this case would be sustained under any of them. *Gau Shan* states that "a foreign antisuit injunction should issue only when the foreign proceeding 1) threatens the jurisdiction of the United States court, *or* 2) evades strong public policies of the United States." 956 F.2d at 1354 (emphasis added); accord *Goss* Pet. App. 8a (also framing threshold requirements as disjunctive); *Deutz*, 270 F.3d at 161 (same). Because the courts below concluded that *both* bases for imposing an antisuit injunction were present here, Pet. App. 32a-33a, 72a-86a, petitioner could not prevail even under its own proposed standard without overcoming each of those case-specific determinations.[5] Petitioner states that the "typical[]" threat-to-jurisdiction cases involved situations where "the foreign court threatened to prevent the domestic court from rendering judgment or to carve out exclusive jurisdiction," Pet. 37, but that is not the same as asserting that the Second Circuit's holding conflicts with the decisions of another court of appeals.[6] In addition, petitioner's disagreement

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[5] Petitioner suggests (Pet. 38) that the Second Circuit "might well have reached a different result" had it not considered the "vexatiousness" of petitioner's conduct, but petitioner's suggestion rests on two dubious premises. The first is discussed and rejected in the preceding paragraph—*i.e.*, that courts applying the most "conservative" standard would not permit consideration of vexatiousness even *after* a threat was shown to the enjoining court's jurisdiction or public policies. The second is the highly implausible assumption that a court that looked *only* to those two factors and ignored vexatiousness would decline to issue an injunction even when, as here, *both* factors were present.

[6] *Goss* stated that even though a judgment in the foreign proceeding "would effectively nullify the remedy Goss legitimately procured in the United States," such a prospect "d[id] not threaten United States jurisdiction." *Goss* Pet. App. 25a. The Eighth Circuit did not explain

with the Second Circuit's conclusion that permitting the Cayman Islands action to proceed would threaten strong public policies of the United States (Pet. 38) is simply a retread of its erroneous contention that the lower courts failed to apply correctly the policies underlying the New York Convention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the basis for that statement, but it appears to have derived from the court's earlier conclusion that "[t]he issues previously decided below * * * are different from the issues sought to be litigated in the foreign jurisdiction." *Id.* at 23a. Although that fact-bound conclusion was erroneous, see *Goss* Br. 12-13, the important point is that here, unlike in *Goss*, the court of appeals concluded that the 2000 arbitration award, "and the federal judgments confirming and enforcing it, actually decided the claims raised in the Cayman Islands action." Pet. App. 22a.